

Supreme Court, U. S.

FILED

FEB 2 1978

MICHAEL ROBB, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

\_\_\_\_\_  
No. 77-1108

1087

Elias Ewanco, Petitioner

v.

Commissioner of Patents, Respondent

\_\_\_\_\_  
Petition for a Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit

*Elias Ewanco*

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\_\_\_\_\_  
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In the  
SUPREME COURT OF THE UNITED STATES

October Term, 1978

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No. 77-1108

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Elias Ewanco, Petitioner,

v.

Commissioner of Patents, Respondent.

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Petition for a Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit

Petitioner prays that a writ of certiorari issue to review  
judgement of the United States Court of Appeals for the Dis-  
trict of Columbia Circuit entered on January 5, 1978.

CITATION TO OPINIONS BELOW

The opinion of the Patent Examiner's Answer mailed April  
21, 1971 is in Appendix A. The opinion of the United States  
Patent Board of Appeals Affirming the Examiner's Rejection  
was mailed April 28, 1972 and is in Appendix B. The Memoran-  
dum Opinion and Order by the United States District Judge for  
the District of Columbia filed December 22, 1976 is in Appendix  
C. The Opinion of the United States Court of Appeals for the  
District of Columbia Circuit which sustained District Court by  
judgement and supportive memorandum was filed January 5,  
1978 and is in Appendix D hereto and is not published.

## JURISDICTION

The judgement of the Court of Appeals with Memorandum was filed January 5, 1978. Petitioner has requested that motion for Stay of Mandate under Federal Rules of Appellate Procedure Rule 41 (b) be granted January 12, 1978.

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

## THE QUESTIONS PRESENTED

1. Has the Patent Office processed this application for Letters Patent throughout in compliance with the Code of Federal Regulations Manual of Patent Examining Procedure?
2. After finding that 35 USC 102 Novelty and Utility were present in plaintiffs application, why didn't the Judge take into account the error in rephraseing (Col. 1, Line 35) of the Fritz Patent by the Examiner's-in-chief in view of the meaning given in Exhibit No. 5 in the Transcript of Proceedings on page 28?
3. Because of the File Wrapper not being delivered to District Judges Chambers as requested, is it possible that this omission may have precipitated the presumptuous remarks on page 41 of the transcript of proceedings?
4. Why didn't the Judge of the Court of Appeals delve deeper into the facts as to Presumption of Correctness when 35 USC 102 was removed as a bar to obtaining Letters Patent?
5. Why is hindsight as a test of obviousness or non-obviousness of an invention condemned as the Supreme Court mandated in *Graham v. John Deere, et al.*, 383 U.S.1(1966)

and instituted by the Appeals Court by not recognizing the difference between prior art and the claims at issue?

6. Why isn't Claim 13 sufficient to overcome the references of Levey 1884 and Fritz 1923 where neither has claimed this joined subject matter?

7. Since the scope of this invention will cross all borders, couldn't this become episodic by its very nature?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions involved are Article 1, Section 8 right to discovery and the 14th Amendment Section 1, nor deny to any person within its jurisdiction the equal protection of the law which are in the United States Constitution.

The Statutes authorizing the Patent Office to issue patents in compliance with 35 USC 101 Inventions Patentable; 35 USC 102 Conditions for Patentability, novelty and loss of right to patent; 35 USC 103 Conditions for Patentability, non-obvious subject matter; 35 USC 112 Specification; 35 USC 145 Civil action to obtain patent; are in the Patent Laws issue of November 1965 United States Department of Commerce pages 15 thru 18 and page 27.

The Rules involved are Rule 31 (1), Rule 707.07 (j), Rule 809.02, Rule 808.01, Rule 818, Rule 904.01 (b) which are in the Code of Federal Regulations and can be found in the Manual of Patent Examining Procedure.

## STATEMENT

Petitioner believes himself to be the original, first and sole inventor of a new deck of playing cards and claimed same with specification and Claim 13.

This contest, within the Patent Office, was finalized by the Examiner's-in-chief Board of Appeals Patent Office decision in Affirming the Patent Examiner's Rejection.

The complaint in the District Court for the District of Columbia was in the Channel of Ex Parte Review procedure and was chosen at this bifurcated point for continuation in seeking Letters Patent. Statute 35 USC 145 Civil action to obtain patent allows this court to review and adjudicate the Patent Office Board of Appeals opinion as the facts in the case may appear as long as a claim is involved from that decision. Claim 13 was in the Board of Appeals decision therefore the basis for Federal jurisdiction was in accord with the law. Claim 7 was canceled in the Appellants Brief Statement of the issues for review section.

## REASONS FOR GRANTING WRIT

This petition raises substantial and important questions of administration and conduct of those responsible for implementing the rules in patent examining procedure. The denial of novelty in this stage was incomprehensible. In the District Court, the error of the Examiner's-in-chief was raised in the rephrasing of specifications. Novelty was allowed in this Court since it is obvious that this invention is 'something new'. The immediate Lower Court did not hold oral hearing and emphasis must be placed on the 'Presumption of Correctness' assumed by that Court.

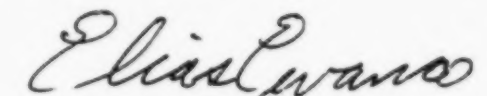
The importance of granting the writ of certiorari for review is necessary to show that the procedure for granting patents still works if the proper use of rules, already promulgated within the system, is used.

The transnational significance of this invention is possibly becoming an eternal standard pre-school learning tool for all who wish to learn or teach the basic symbols of the English language is important.

## CONCLUSION

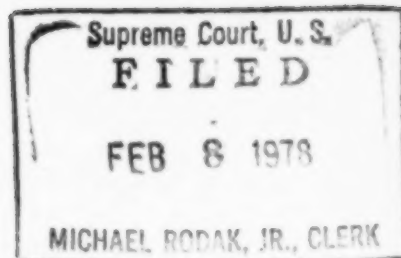
The petition for certiorari should be granted.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1977

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No. 77-1087

Elias Swanco, Petitioner

v.

Commissioner of Patents, Respondent

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Appendix to

Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

A handwritten signature in cursive script, appearing to read "Elias Swanco".

Elias Swanco, Pro Se.  
1613 Balhurst Avenue  
Pittsburgh, Pa. 15204

PAGINATION AS IN ORIGINAL COPY

In re application

Elias Ewance

Ser. No. 12 884

Filed 2-2-70

For PRE-SCHOOL LEARNING Before the Board of Appeals

Appeal No. 090 05

Mailed April 21, 1971

GROUP 330

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Examiner's Answer

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This is an appeal from the final rejection wherein the Examiner rejected claims 7-12. By amendment after final rejection applicant has cancelled claims 8-12 and added claim 13. Accordingly the appeal is directed to claims 7 and 13. No claims are allowed.

A correct copy of the appealed claims appears on page 2 of applicant's brief.

THE REFERENCES OF RECORD RELIED ON ARE:

298,991  
1,557,824

Levey  
Fritz

5-1884  
10-1925

THE REJECTION

Claim 7 is rejected under 35 USC 102 as unpatentable over Fritz. Reference is made to page 2 of the Final Rejection (Paper No.3) for the statement of the ground of rejection.

4/19/71

Claim 7 is further rejected under 35 USC 103 as unpatentable over Fritz, taken together with Levey. Reference is made to page 3 of the Final Rejection for the statement of the ground of rejection.

Claim 13, added since the Final Rejection, is rejected under 35 USC 103 as unpatentable over Fritz, taken together with Levey. The ground of rejection of claim 7, as outlined in the preceding paragraph and discussed on page 3 of the Final Rejection, is also applicable to claim 13.

#### RESPONSE TO ALLEGATIONS

In discussing claim 7 applicant narrowly interprets the term "conventional playing cards" as requiring rank and suit markings on the cards. However a claim should be given the broadest reasonable interpretation. As it is, claim 7 is broad enough to be readable on cards which are blank except for the alphabet and number indicia. If applicant intended claim 7 to be limited to cards marked to show their suit and rank this language should have been in the claim, as it is in claim 13.

In referring to Levey applicant gives the impression that the reference only has court or picture cards. Actually Levey can have the usual fifty-two cards or any other number. See lines 56-59 of Levey.

At the bottom of page 10 applicant suggests that, when combining the teachings of Fritz and Levey, confusion would be introduced by placing two different letters on the same picture card. Applicant does not show his picture cards, but it seems that they also have two different letters. For example, his Jack of Spades has a "J" for Jack and a "K" for the eleventh letter in the alphabet, according to the last five lines of page 3 of the substitute specification.

For the reasons set forth above and incorporated by reference from the Final Rejection it is believed that the rejection is proper.

W.H. Grieb: Examiner

GROUP ART UNIT 336

Appeal No. 090-05

MAILED

Hearing:  
April 5, 1972

APR 28 1972

U.S. PATENT OFFICE  
BOARD OF APPEALS

IN THE UNITED STATES PATENT OFFICE

BEFORE THE BOARD OF APPEALS

Ex parte Elias Ewance  
- - -

Application for Patent filed February 2, 1970,  
Serial No. 12,884 which is a continuation of Serial  
No. 846,079, filed July 30, 1969. Pre-School Learning.

Before Reaming, Parker and Mattern, Examiners-in-Chief.  
Parker, Examiner-in-Chief.

This is an appeal from the final rejection by the  
examiner of two claims, numbered 7 and 13, of appellant's  
application for a patent on a pre-school learning device  
as being unpatentable over the prior art. Both Sections  
102 and 103 of Title 35 U.S.C. are involved.

As depicted in the application drawings, appellant's  
instructional device comprises a deck of playing cards  
which are said to be so modified as to provide an effec-  
tive teaching and learning tool for youngsters. Each  
card contains at least one alphabet letter and a number  
corresponding to the numerical position of that letter  
in the alphabet.

The appealed claims read as follows:

7. An instructional device comprising:

- (1) a deck of conventional playing cards,
- (2) an alphabet letter on each card of said deck,
- (3) a number on each card specifying the numerical position of said letter in the alphabet.

13. An instructional device comprising:

- A. a deck of cards, each card having a face carrying
  - (a) indicia identifying the suit of the card and the rank of the card in said suit;
  - (b) at least one alphabet letter;
  - (c) a number corresponding to the numerical position of said letter in the alphabet.

B. said deck consisting of fifty-two cards, including four suits of 13 cards each, and carrying at least two complete alphabets.

The references relied upon are:

Levey	298,991	May 20, 1884
Fritz	1,557,824	Oct. 20, 1925

The patent to Levey relates to playing cards. It discloses a deck of fifty-two playing cards having cards in each suit which contain the pictures of the court-cards they are intended to represent and spots or suit-pips corresponding in number to the numerical value of the card. For example, one card of each suit has imprinted thereon a picture to represent the knave and also eleven spots or pips, and another card of each suit a picture to represent the queen and also twelve spots or pips, and a third card of each suit a picture to represent the king and also thirteen spots or pips.

The patent to Fritz relates to an educational game. It discloses a deck of fifty-two cards with two alphabet letters on each card and a number on each card specifying a numerical position of the letter in the alphabet. Within the deck of fifty-two cards, there are two cards each bearing a similar letter, i.e., two alphabets of twenty-six cards each (see page 1, lines 39-51).

Claim 7 stands rejected under the provisions of 35 USC 102 as being unpatentable over Fritz. Claim 7 stands further rejected under 35 USC 103 as being unpatentable over Fritz taken in combination with Levey.

In our opinion, the record in this case fully supports the examiner in his rejection of the appealed claims.

From what has been said hereinbefore, it is believed clear that claim 7 is fully anticipated by the disclosure of Fritz (35 USC 102). Fritz, in the language of claim 7, discloses an instructional device (col.1, line 11) which comprises a deck of conventional playing cards (col.1, line 35), an alphabet letter 14 on each card of the deck and a number 13 on each card specifying the numerical position of the letter in the alphabet (col.1, lines 35-55). For the foregoing reason, we find no error in either the examiner's reasoning or his conclusion, both of which have been carefully reviewed in the light of all of appellant's arguments. Accordingly, we will sustain the examiner's rejection of claim 7 under the provisions of 35 USC 102.

In rejecting claims 7 and 13 as being unpatentable over Fritz in view of Levey under the provisions of 35 USC 103, the examiner took the position that since "Fritz and a conventional deck such as Levey's both have 52 cards and since conventional decks are commonly found in homes and are played with by children it would be obvious to one familiar with the disclosure of Fritz that the letters and numbers described by him could be applied to a conventional deck of cards, such as the deck of Levey, to enable the deck to be used for educational purposes as well as for ordinary card games." In view of the detailed disclosure of Fritz set forth hereinbefore, we agree with the examiner. Therefore, we will also sustain the examiner's rejection of claims 8 and 13 under the provisions of 35 USC 103.

We have carefully considered the contentions and arguments presented in appellant's various papers as well as those presented at the hearing but we are of the opinion that the examiner's rejections were proper and they will be sustained.

The decision of the examiner is affirmed.

AFFIRMED

George Roeming  
Examiner-in-Chief

F. Parker  
Examiner-in-Chief

Fred C. Mattern, Jr.  
Examiner-in-Chief

BOARD  
OF  
APPEALS

UNITED STATES DISTRICT COURT  
for the District of Columbia

Filed Dec. 22, 1976  
JAMES F. DAVEY, CLERK

Elias Swanco, Plaintiff,

v.

Civil Action No. 1187-72

Commissioner of Patents  
and Trademarks, Defendant.

MEMORANDUM OPINION AND ORDER

This is an action brought under the provisions of 35 USC 145 seeking an order from the Court directing the Commissioner of Patents and Trademarks to issue letters patent on an application, serial No. 12,884, a continuation of serial No. 846,079 filed July 30, 1969, for an invention characterized as follows:

Claim 7: An instructional device comprising:

- (1) a deck of conventional playing cards,
- (2) an alphabet letter on each card of said deck,
- (3) a number on each card specifying the numerical position of said letter in the alphabet.

Claim 13: An instructional device comprising:

- A. a deck of cards, each card having a face carrying
  - (a) indicia identifying the suit of the card and the rank of the card in said suit;
  - (b) at least one alphabet letter;
  - (c) a number corresponding to the numerical position of said letter in the alphabet.
- B. said deck consisting of fifty-two cards, including four suits of thirteen cards each, and carrying at least two complete alphabets.

Plaintiff, in his application in suit, claims an instructional device for pre-school children combining a deck of cards, the twenty-six letters of the English alphabet, and the Arabic numbers 1 through 26.

The question to be resolved is whether the subject matter of the application is obvious under 35 USC 103 or anticipated in the art under 35 USC 102. References relied upon by the Patent Office in rejecting the claims are:

Levey Serial No. 298,991 May 30, 1884  
Fritz Serial No. 1,557,824 October 20, 1925

Claim 7 was rejected under 35 USC 102 as unpatentable over Fritz and under 35 USC 103 as unpatentable over Fritz taken with Levey. Claim 13 was rejected under 35 USC 103 as unpatentable over Fritz taken with Levey.

Levey discloses a deck of fifty-two ordinary playing cards which has been modified to have the "face" or "honor" cards include the rank of the cards. For example, a jack or knave of hearts would have a picture of a jack, eleven heart spots or pips, and the number eleven on it. A queen would have a picture, twelve heart pips, and the number twelve.

Fritz discloses an educational game with a deck of fifty-two cards, each having an alphabet letter and the corresponding number of the letter's position in the alphabet; e.g., "A" would have a "1", "Z" would have a "26". Since there are fifty-two cards, there are two complete alphabets per deck. What are commonly known as "suits"

to persons familiar with playing cards could be signified by animal figures in the Fritz patent.

Since as far back as Hotchkiss v. Greenwood, 52 U.S. 247 (1850) the test for patentability has been that the invention must be the result of the exercise of ingenuity and skill beyond that possessed by one of ordinary skill in the art. This test is found in the U.S. Code at 35 USC 103. Three basic factual inquiries essential to a determination of obviousness are: scope and content of prior art; difference between prior art and the claims at issue; and level of ordinary skill in the pertinent art. Halliburton Co. v. Dow Chemical Co., 514 F. 2d 377 (10 Cir. 1975); accord, Trico Products Corp. v. Roberk Co., 490 F. 2d 1280 (2Cir. 1973), cert. den. 417 U.S. 33.

Plaintiff claims to have invented a new deck of cards comprised of regular cards, so to speak, to which letters and numbers have been added. Fritz shows letters and their corresponding number rank on the faces of a blank deck of fifty-two cards. Levey shows that numbers which normally do not appear on the face of cards could be added.

Therefore, the Court holds that the claims in issue do not define a patentable invention under 35 USC 103 over the references cited.

This memorandum opinion may serve as finding of fact and conclusions of law and judgement order.

Matthew F. McGuire  
United States District Judge

December 21, 1976

not to be published- see local rule 8 (f)  
UNITED STATES COURT OF APPEALS  
for the District of Columbia Circuit

Bo. 77-1108

September Term, 1977

Elias Ewanco, Appellant

Civil No. 1187-72

v.

United States Court of Appeals  
for the District of Columbia Circuit

Commissioner of Patents

Filed Jan 5, 1978  
George A. Fisher, Clerk

Appeal from the United States District Court for the District of Columbia

Before: Wright, Tamm and Leventhal, Circuit Judges

JUDGEMENT

This cause came on for consideration on the record on appeal from the United States District Court and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgement of the District Court appealed from herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam  
for the Court

George A. Fisher  
Clerk

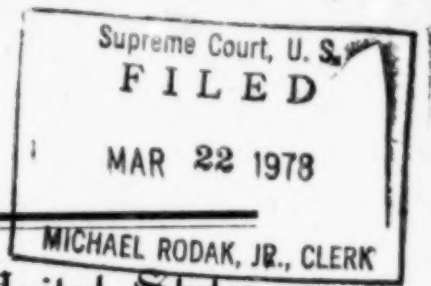
Bills of costs must be filled within 14 days after entry of judgement. The Court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

We have given careful consideration to appellant's submission, particularly because he files pro se. He seeks a patent on Claim 13 for an instructional device, a deck of 52 cards, carrying at least two complete alphabets, with each card having a face carrying (a) indicia of suit and rank of card, (b) at least one alphabet letter, and (c) a number corresponding to the numerical position of said letter(s) in the alphabet. Our review convinces us that the opinion of District Judge McGuire is sound, that there is no basis for overcoming the presumption of correctness of the determination of the Patent Office, that this result is required by the Supreme Court's rulings on obviousness and nonobviousness, see Graham v. John Deere, et al., 383 U.S. 1 (1966) and that the Levy and Fritz references cited by the district court preclude a reversal by this court.

AFFIRMED.

No. 77-1087



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*In the Supreme Court of the United States*

OCTOBER TERM, 1977

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ELIAS EWANCO, PETITIONER

v.

COMMISSIONER OF PATENTS

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

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MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION

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WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1087

ELIAS EWANCO, PETITIONER

v.

COMMISSIONER OF PATENTS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

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MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION

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1. Petitioner brought this suit in the United States District Court for the District of Columbia, pursuant to 35 U.S.C. 145, after the United States Patent Office's Board of Appeals had affirmed a Patent Examiner's decision denying him a patent. The items sought to be patented are two decks of playing cards with an alphabet letter on each card and a number denoting the letter's position in the alphabet. The cards are intended to be used by pre-school children. Because two patents had been issued for similar decks of playing cards, the Board of Patent Appeals denied petitioner's application on the grounds that one deck (Claim 7) failed to meet the requirement of 35 U.S.C. 102 that the invention not be anticipated in the art, and that both decks (Claims 7 and 13) failed to meet the requirement of 35 U.S.C. 103 that

the subject matter of the application not be obvious (Pet. App. B). The district court held that neither deck of cards is patentable under 35 U.S.C. 103 (Pet. App. C).<sup>1</sup> The court of appeals affirmed (Pet. App. D).<sup>2</sup>

2. Under 35 U.S.C. 103, an application must be denied "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which such subject matter pertains." *Graham v. John Deere Co.*, 383 U.S. 1, held that three basic factual inquiries are essential to consideration of obviousness: (1) the scope and content of the prior art; (2) the differences between the prior art and the claim at issue; and (3) the level of ordinary skill in the pertinent art. The Board of Patent Appeals, the district court and the court of appeals all gave careful consideration to petitioner's claims and each held that his cards failed the test of obviousness. It is obvious that letters and numbers can be placed together on playing cards, and there is nothing unique in petitioner's cards. Cf. *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273. Petitioner raises no question of general importance and there is, accordingly, no reason to review the denial of his application.

<sup>1</sup>The district court did not reach the question whether 35 U.S.C. 102 also required a finding that Claim 7 is unpatentable.

<sup>2</sup>Petitioner did not raise the denial of Claim 7 on appeal (Pet. App. 17D; Pet. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MARCH 1978.